87-310

No._____

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1986

EDWIN E. WIEGAND, Petitioner,

v.

UNITED STATES OF AMERICA.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTIONS PRESENTED

1. Does mere presence of child pornography in a person's home, without more, establish probable cause to search for and seize such material as evidence of federal child pornography violations?

2. Are First and Fourth Amendment requirements for specificity in warrants satisfied by a warrant to seize child pornography which does not identify individual items but allows for confiscation of pictures described only in general, categorical terms?

3. Are pictures of a nude seventeen year old girl not otherwise engaged in sexual conduct subject to seizure and prosecution under federal child pornography laws on the basis of their potential for "sexual stimulation of the viewer"?

4. Are federal statutes prohibiting the receipt, distribution and production of pictures showing nonobscene but "lascivious" exhibitions of a minor's genitals unconstitutionally vague when applied in a criminal prosecution involving depictions of nudity without overt sexual activity?

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SUPREME COURT OF THE UNITED STATES

October Term, 1986

EDWIN E. WIEGAND, Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

Petitioner Edwin E. Wiegand respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 812 F.2d 1239 and is reprinted in the Appendix hereto at A-1.

The verdict of the District Court is reported as *United States v. Dost* at 636 F.Supp. 828 and is reprinted in the Appendix hereto at A-13. The oral verdict of the District Court is included in the Appendix hereto at A-25 and the oral ruling of the District Court denying petitioner's motions is included at A-28.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 18, 1987. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied July 10, 1987. (A-31.)

This Court's jurisdiction is invoked under 28 United States Code section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 1: "Congress shall make no law . . . abridging the freedom of speech..."

United States Constitution, Amendment 4: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 18, United States Code, section 2251(a): "Any person who employs . . . any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished . . ."

Title 18, United States Code, section 2252(a): "Any person who . . . knowingly receives . . . any visual depiction . . . [which] involves the use of a minor engaging in sexually explicit conduct . . . shall be punished . . ."

Title 18, United States Code, section 2255: "For purposes of this chapter, the term . . . 'sexually explicit conduct' means actual or simulated . . . lascivious exhibition of the genitals or pubic area of any person ."

STATEMENT OF THE CASE

Petitioner was indicted and convicted in the United States District Court for the Southern District of California on two counts of using minors in the production of photographs depicting a "lascivious exhibition of the genitals," a violation of 18 U.S.C. 2251(a), of conspiring to violate section 2251(a), and of receiving mailed pictures of minors lasciviously exhibiting genitals, a violation of 18 U.S.C. 2252(a)(2).

The District Court had jurisdiction under 18 U.S.C. 3231 and the Court of Appeals had jurisdiction pursuant to 28 U.S.C. 1291.

The facts are these:

In early December, 1985, FBI Agent George Runkle sought a warrant to search the residence where Edwin Wiegand lived.

Mr. Runkle alleged he had been told by a confidential informant that in April, 1983 the informant had viewed some films at Mr. Wiegand's home which depicted children as young as nine or ten years old involved in sexually explicit conduct.

Another person named Lang had told the informant about seeing the "last half" of Mr. Wiegand's "kiddie

porno films" sometime in mid-October 1985. Lang reportedly told a second informant named Ruddiman he had viewed films at Mr. Wiegand's home in mid-October 1985 which had included film of a "nude children's beauty pageant." Lang also claimed to have photographed "young nude females" in Europe and sent pictures and magazines (of unknown and undescribed content) to Mr. Wiegand from Europe in the summer of 1984.

Mr. Wiegand reportedly told Ruddiman he had received child pornography films from Sweden in 1977 and 1978. Ruddiman told the agent that co-defendant Robert S. Dost claimed to have viewed one of Mr. Wiegand's "Swedish videos" in November 1985 which involved a young female ten to twelve years old. Ruddiman also had a conversation with Mr. Wiegand in October 1985 in which Wiegand indicated one of his films depicted a twelve or thirteen year old girl engaging in sexual intercourse.

Based on this information, a magistrate issued a warrant to search Mr. Wiegand's home for "films, photographs, video tapes, negatives or slides depicting a person under the age of 18 years engaged in an act of sexual conduct," including "exhibition of the genitals for the purpose of sexual stimulation of the viewer," items said to be concealed "[i]n violation of Title 18, U.S.C. 1462, 2251 and 2252."

The warrant was served on December 10, 1985 when Mr. Wiegand was greeted at his door by FBI agents. An extensive search lasting 6 1/2 hours between 8:30 A.M. and 3:00 P.M. was conducted by five officers. Large quantities of films and pictures were seized. Agent Runkle who was leading the search did not arrest Mr. Wiegand at that time because he "felt there was no

probable cause to believe that a federal crime had been committed."

Based on evidence seized during the search, Mr. Wiegand was indicted with co-defendant Robert S. Dost and charged with two counts each of sexually exploiting minors and conspiring to sexually exploit minors in violation of 18 U.S.C. sections 2251(a) and 371 and also with a single count of receiving illegal pornography through the mails in violation of 18 U.S.C. section 2252(a)(2).

Mr. Wiegand made a number of motions in the district court including a motion to suppress evidence and return property seized from his home pursuant to the warrant. The defendants also sought dismissal of the indictment asserting the definition of "sexually explicit conduct" in 18 U.S.C. 2255 is unconstitutionally vague with respect to a "lascivious exhibition of the genitals or pubic area." The motions were denied.

A nonjury trial was conducted based on the following stipulated facts: on June 16, 1984, Mr. Wiegand participated with Robert S. Dost taking certain photographs of Yvonne Weston who Mr. Wiegand knew was seventeen years old at the time. The photographs introduced as Exhibits 2 through 10 and 12 through 23 depict a fully developed, sexually mature nude woman appearing alone in various poses. She is not engaging in any overt sexual conduct in the pictures. Exhibit 11 is a photograph taken by Mr. Wiegand and Mr. Dost on June 18, 1984 showing a young prepubescent girl, Shana Lee who was 11 years old, sitting nude on a beach next to a young boy wearing shorts. The photographs had been developed for the defendants by a mail order photo-

processing company.

The defendants were found guilty of all counts based on a conclusion the photographs depicted "sexually explicit conduct" consisting of a "lascivious exhibition of the genitals."

The judgment was affirmed by the Ninth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions regarding use of federal statutes and the power of search and seizure to suppress "child pornography."

Armed only with information that Mr. Wiegand possessed child pornography, federal agents obtained a warrant to search Mr. Wiegand's home and to confiscate films and pictures present there. The warrant did not identify any individual items believed to be child pornography illegally possessed by Mr. Wiegand. Mr. Wiegand was prosecuted for pictures found during the search which showed nudity but no distinctly sexual conduct, pictures said to depict a "lascivious" exhibition of a minor's genitals.

The Court should consider whether simple possession of child pornography in a home gives cause to search for and confiscate the pornography with a warrant authorizing the search party to make its own determination which items are illegally possessed pictures of nude minors. Further, the interpretation and constitutionality of the federal law as applied is squarely at issue here, whether the federal law prohibiting production and receipt of

pictures showing only a "lascivious exhibition" of genitals provides a meaningful standard for assessing criminal liability.

1. THE COURT SHOULD CONSIDER WHETHER MERE POSSESSION OF CHILD PORNOGRAPHY IN A PERSON'S HOME ESTABLISHES CAUSE TO SEEK AND IMPOUND SUCH MATERIAL AS EVIDENCE OF FEDERAL CRIMES.

There is no question the search warrant affidavit showed that Mr. Wiegand possessed child pornography in his home. Likewise, there is no doubt Mr. Wiegand was not involved in commercial production or distribution of pornography. Mr. Wiegand was not arrested when the warrant was executed since when Agent Runkle applied for and served the warrant, he did not feel there was probable cause to believe Mr. Wiegand had committed a federal offense. In fact, the warrant affidavit did not detail any illegal receipt or production of child pornography by Mr. Wiegand.

Nevertheless, the Court of Appeals concluded that the evidence Mr. Wiegand possessed quantities of child pornography in his home was sufficient to establish probable cause he had received or produced the material illegally.

In 1984, Congress enacted the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 206, expanding the existing federal law which had prohibited receipt of child pornography for purpose of sale to include receipt of child pornography for purely personal purposes for the first time. Therefore, even if Mr. Wiegand's possession of

material could lead to an inference he received the items in the mail or from interstate commerce, the affidavit failed to indicate Mr. Wiegand received any items after the 1984 amendments became effective, making his receipt for personal use illegal.

However, a more fundamental concern arises when mere presence of films in the home is said to establish probable cause for seizure of the films. *Stanley v. Georgia*, 394 U.S. 557 (1965) established Mr. Wiegand's right to "read or observe what he pleases" in the privacy of his home, "free from state inquiry into the contents of his library." *Stanley* holds "this right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." 394 U.S. at 564. The profound constitutional rights recognized in *Stanley* extend to speech ordinarily without constitutional protection, speech the government may legitimately suppress in contexts other than personal, private possession in one's library at home.

If, as the Court of Appeals concluded, Mr. Wiegand's mere possession of pornography in his home gives the government authority to search and seize, *Stanley v. Georgia* is rendered little more than a platitude.

The decision of the Court of Appeals is antithetical to the holding of *Stanley*. The issue raised is not merely a fact-bound evaluation of probable cause; it is a question of overriding importance since any home where pornography is thought to be located will be subject to search and lawfully possessed film and picture collections will be subject to confiscation if the Court of Appeals' probable cause analysis is allowed to stand.

Uncontrolled government ransacking of private papers and libraries maintained by individuals in their private homes was the historical basis for the First and Fourth Amendments, a history detailed in *Marcus v. Search Warrant*, 367 U.S. 717, 724-728 (1961) and *Stanford v. Texas*, 379 U.S. 476, 481-484 (1965). Certiorari should be granted to consider whether the Court of Appeals decision gives government agents too free a hand to search for and seize pornography from a person's home, to consider whether the decision authorizing a seizure of pornography based only on a showing of private, noncommercial possession in the home conflicts with *Stanley v. Georgia*.

2. THE COURT SHOULD CONSIDER WHETHER A WARRANT TO SEIZE PORNOGRAPHY DESCRIBED ONLY IN GENERIC TERMS IS SUFFICIENTLY SPECIFIC.

The warrant used to seize pornography from Mr. Wiegand's home did not identify any individual items previously determined by a magistrate to be subject to confiscation as illegal expression. Instead, the warrant was open-ended, leaving the selection of what items to seize solely to the discretion of the executing officers based on their ad hoc assessment during the search which material constituted illegal child pornography. Such procedures have never before been approved by the Court in this "sensitive area."

Whether a warrant to seize child pornography may be framed like the warrant here, in only broad, generic terms, or whether it must specifically identify individual items to be seized is a question of significant current interest worthy of review by this Court. *Compare United*

States v. Hale, 784 F.2d 1465 (9th Cir. 1986) *with United States v. Hurt*, 795 F.2d 765 (9th Cir. 1986); *see also United States v. Diamond*, 820 F.2d 10 (1st Cir. (en banc) 1987).

The Court has consistently recognized "special constraints" on searches for and seizures of material presumptively protected by the First Amendment, *Maryland v. Macon*, 472 U.S. 463, 468 (1985), insisting the Fourth Amendment's requirement that warrants particularly describe the "things to be seized" be applied with "scrupulous exactitude" in such circumstances. *Stanford v. Texas*, 379 U.S. 476, 485 (1965). The rule is based on a recognition that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished is finely drawn," and that "the separation of legitimate from illegitimate speech calls for . . . sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

Only neutral magistrates, not searching government agents, are authorized to delineate the "dim and uncertain line" between protected and unprotected expression, to dispel the presumption of protection for speech rendering it subject to seizure or censorship. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-71 (1963); *Lee Art Theater v. Virginia*, 392 U.S. 636, 637 (1968). The Court has never sanctioned seizure of obscene material without a warrant identifying each individual item after a neutral magistrate found cause to believe it was obscene. *New York v. P. J. Video, Inc.*, 475 U.S. ___ (1986) (requiring "a reasonably specific affidavit describing the content of a film . . . for the magistrate to determine whether there is probable cause to believe the film is obscene"); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325 (1979). Seizure of suspected

obscenity must be preceded by an independent judicial determination of probable obscenity. *Heller v. New York*, 413 U.S. 483, 488-489 (1973). Seizure of child pornography requires no less.

The dim, uncertain and finely drawn line between legal and illegal pictures and films is not made more certain merely by invoking the concept of "child pornography." *New York v. Ferber*, 458 U.S. 747, 756 (1982) recognized: "Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy."

No magistrate decided before the search and seizure at Mr. Wiegand's home that there was cause to believe the pictures of the two young women were prohibited child pornography. Notably, before the search the government agents did not even know that Mr. Wiegand possessed the pictures which ultimately formed the basis of the prosecution.

The pictures seized from Mr. Wiegand's home are a prime example of the difficulty distinguishing between illegal child pornography and lawful depictions of mere nudity.

None of the pictures show overt sexual conduct. The pictures of seventeen year old Yvonne Weston (Exhibits 2-10 and 12-23) could as well have been intimate but legitimate pictures of an adult loved-one as child pornography. The single picture of Shana Lee sitting on the beach (Exhibit 11) is devoid of sexual context other than the child's natural nakedness. The evaluation and analysis necessary to decide an exhibition of genitals in a

picture is "lascivious" or may be "sexually stimulating to a viewer" is considerably more difficult, more complex and more subtle than merely ascertaining a picture depicts a sex act. The determination that the pictures were subject to confiscation under federal law for depicting a "lascivious exhibition of the genitals" should have been made by a neutral magistrate, not the government agents during the course of their search.

Certiorari should be granted to consider whether seizure and confiscation of presumptively protected expression suspected of being illegal child pornography must be accomplished under the same "special constraints" for seizure of obscenity including the requirement a warrant identify individual items to be seized, or whether it is sufficient to permit executing officers to evaluate the content of pictures and make an in-the-field determination whether or not expression is subject to government suppression.

3. THE COURT SHOULD CONSIDER WHETHER THE FEDERAL CHILD PORNOGRAPHY LAW WAS INTENDED TO REGULATE PICTURES ONLY DEPICTING NUDITY WHICH MIGHT BE SEXUALLY STIMULATING FOR A VIEWER.

The warrant authorized confiscation of pictures showing minors engaged in certain explicitly described sexual conduct including sexual intercourse and masturbation. The pictures at issue in the case were not within those precise and graphic provisions of the warrant. Instead, the government relied on the portion of the warrant directing seizure of pictures containing an "exhibition of the genitals for the purpose of sexual

stimulation of the viewer."

Title 18 U.S.C. section 2255 (2)(E) defines child pornography to include depictions of minors engaged in a "lascivious exhibition of the genitals or pubic area." The language of the warrant did not mimic the language of Congress in defining what nude pictures of a minor constitute child pornography.

The Court of Appeals dismissed the variation between the legislative language and the language of the warrant which relied on a hypothetical viewer's reaction to a picture instead of an evaluation of the content of the picture itself. The Court of Appeals held "[t]he warrant was slightly more specific than the statute" (A-7) and a "lascivious" exhibition of genitals is a display "so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur." (A-10.) Reviewing the conviction to determine whether the pictures showed a "lascivious" exhibition, the Court of Appeals applied this same subjective standard as well.

Certiorari should be granted to consider whether the depiction of a minor's conduct rather than a viewer's reaction to the depiction is the proper basis to evaluate when federal child pornography laws have been violated.

A picture of a nude minor (and perhaps even a picture of a fully clothed child) may be sexually stimulating to a pedophile without involving any sexual conduct by the minor. The Court of Appeals' conclusion to the contrary, that the warrant was more specific than the statute by relying on a viewer's reaction instead of the minor's conduct depicted, is simply not logical. And, the Court of Appeals' construction of the term "lascivious

exhibition of genitals" is not consistent with the purpose the statute was intended to serve.

The federal child pornography laws were not designed to police people's minds or to suppress sexual thoughts or fantasies about children. Rather, the purpose of Congress was to combat the "physiological, emotional and mental" harm caused to children who are used in the production of pornography. See Pub. L. No. 98-292, sec. 2, 98 Stat. 204 (congressional findings). *New York v. Ferber*, 458 U.S. 747, 756-762 (1982) justified content-based child pornography laws with reference to the compelling interest in "safeguarding the physical and psychological well-being of a minor," not the interest in controlling the thoughts or sexual stimulation of adults. In fact, *Stanley v. Georgia*, 394 U.S. at 565-566 observes: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds;" the state "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."

Ferber, 458 U.S. at 764 noted "limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment." The Court held: "As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable . . . law, as written or authoritatively construed" and "[t]he category of 'sexual conduct' proscribed must also be suitably limited and described."

The construction of the federal law adopted by the Court of Appeals does not distinguish between depictions of mere nudity and pictures showing sexual conduct of minors. Like the ordinance invalidated in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975), the Court

of Appeals' construction of the term "lascivious exhibition of genitals" is not directed at sexually explicit nudity, but includes visual depictions showing only a "baby's buttocks . . . or scenes from a culture in which nudity is indigenous" if the pictures might "arouse or satisfy the sexual cravings of a voyeur."

The Court should consider the important question concerning the scope of the federal child pornography law in light of the *Ferber* requirements, and in particular, whether a construction of the federal law which emphasizes the sexual stimulation of a viewer rather than the conduct of the child depicted sweeps more broadly than is necessary, more broadly than is constitutionally permitted and more broadly than was intended by Congress.

4. THE COURT SHOULD CONSIDER WHETHER THE TERM "LASCIVIOUS EXHIBITION OF THE GENITALS" IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO THE PICTURES IN THIS CASE.

The prosecution depended on nude pictures of two young females. However, since the pictures did not show sexual intercourse, masturbation or other distinctly sexual conduct, the indictment only charged the pictures showed a "lascivious" exhibition of the genitals.

The question squarely presented is whether the term "lascivious exhibition of genitals" is unconstitutionally vague, a question which is not before the Court for the first time.

The term "lewd exhibition of the genitals" first found

its way into the federal law of obscenity and pornography in *Miller v. California*, 413 U.S. 15, 25 (1973) as one of the examples of sexual "conduct" subject to an obscenity sanction. However, long before *Miller*, the terms "lewd" and "lascivious" had wide use in obscenity laws. *Swearingen v. United States*, 161 U.S. 446, 450 (1896) for example held the terms "obscene, lewd and lascivious" are all synonymous. *Roth v. United States*, 354 U.S. 476, 491-492 (1957) rejected an argument that the terms "obscene, lewd, lascivious or filthy" are unconstitutionally vague by construing the words as equivalent with the legal definition of obscenity. *Roth* therefore squarely held "lascivious" and "lewd" are synonymous with "obscene" and "obscene" is not unconstitutionally vague as authoritatively defined.

The same day *Miller v. California* was decided, the *Roth* vagueness holding was reiterated in *United States v. 12 200 Foot Reels*, 413 U.S. 123, 130 fn. 7 (1973) noting that "when . . . a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' [or] 'lascivious'" as used in federal statutes, the court is prepared to construe the terms as limited to the *Miller* standard of obscenity, a promise that was fulfilled in *Hamling v. United States*, 418 U.S. 87, 114 (1974). *See also Mishkin v. New York*, 383 U.S. 502, 506 (1966) rejecting a claim "sadistic" and "masochistic" are vague by construing the terms to be synonymous with "obscene."

The term "lewd exhibition of the genitals" was included in the child pornography law upheld in *New York v. Ferber*, 458 U.S. 747, 751 (1982). As noted above however, *Ferber* pointed out that "the category of 'sexual conduct' proscribed must . . . be suitably limited and described." (458 U.S. at 764.)

Ferber held the test for child pornography need not be coextensive with the obscenity standard, but the decision also significantly cites *Miller v. California* with reference to a "lewd exhibition of the genitals." (458 U.S. at 765) While a depiction of minors engaged in intercourse or masturbation need not be lewd, lascivious, or meet the obscenity standard, *Ferber* at least implies a "lewd exhibition of genitals" is the same as an "obscene" exhibition under *Miller*. This interpretation would be consistent with the long line of cases beginning with the venerable 1896 *Swearingen* decision equating the terms obscene, lewd and lascivious, and the cases holding "lewd" and "lascivious" avoid unconstitutional vagueness only if the terms are given the same legal definition as obscenity. However, the District Court and the Court of Appeals both refused to construe "lascivious" as the equivalent of obscene.

Lower courts have struggled to define the term "lascivious" and its counterpart "lewd," reaching many conflicting results. *D. C. v. City of St. Louis, Mo.*, 795 F.2d 652 (8th Cir. 1986) held the term "lewd" in a criminal statute to be unconstitutionally vague and the same result for "lewd and lascivious" was reached in *Schwartzmiller v. Gardner*, 567 F.Supp. 1371 (D. Idaho 1983), *rev'd on other grounds*, 752 F.2d 1241 (9th Cir. 1984). Other courts, including the Court of Appeals here have reached a contrary conclusion.

In ordinary usage, the terms "lewd" and "lascivious" do not have a definite and specific referent, but they apply broadly to conduct which the speaker considers beyond the bounds of propriety. Thus, *Morgan v. City of Detroit*, 389 F.Supp. 922, 930 (E.D. Mich. 1975) observed

that all definitions of "lewd" are subjective, dependent upon the speaker's "social, moral and cultural bias."

With the aid of dictionaries, some courts have defined "lewd" and "lascivious" by reference to a list of epithets such as wanton, lustful, dissolute, filthy, indecent, lecherous, licentious, libidinous, salacious, debauched, repulsive, foul, abominable and loathsome. *Morgan v. City of Detroit*, 389 F.Supp. at 930; *Pryor v. Municipal Court*, 25 Cal.3d 238, 248-249, 599 P.2d 636 (1979); see also footnote 4 of Justice Harlan's opinion in *Manual Enterprises v. Day*, 370 U.S. 478, 483 (1962).

However, this impressive list of pejorative adjectives confers no clarity upon the terms since "the very phrases and synonyms through which meaning is purportedly ascribed serve to obscure rather than to clarify . . ." *State v. Kueny*, 215 N.W.2d 215, 217 (Iowa, 1975). "[V]ague statutory language is not rendered more precise by defining it in terms of synonyms of equal or greater uncertainty." *Pryor v. Municipal Court*, 25 Cal.3d at 249.

The efforts of the District Court judge in this case to decide whether the pictures show mere nudity or a "lascivious" exhibition of genitals serve to illustrate the vagueness of the term.

The decision the pictures of Yvonne Weston, exhibits 2 through 10 and 12 through 23, show nudity constituting a "lascivious" exhibition of genitals was based on a determination by the District Court the photographs "depict or suggest a willingness to engage in sexual activity or a sexually coy attitude," represented by prone or semi-prone and sitting-up poses, said to be positions for "a generally accepted method of sexual activity," and

a facial expression "of a coy person attempting to elicit or suggest that she is extremely willing to have sex, and is almost in a way asking for it."

The picture of Shana Lee, exhibit 11, was not found to portray a willingness to engage in sexual activity or a sexually coy attitude, but was still held to constitute a "lascivious" exhibition because the subject of the photograph is said to be "in an unnatural pose." At the very least, "lascivious" includes a sexual implication. However, the criteria used to judge the single picture of Shana Lee ignores sexual connotations and includes nonsexually oriented pictures of a nude child sitting on the beach if the child's pose is considered "unnatural" by the viewer of the picture.

The test applied to the pictures of Yvonne Weston, ascertaining a "sexually coy attitude" or a willingness to engage in sexual activity, rests in large part on the imagination and individual reactions of any particular observer to a specific picture. This standard was derived from *United States v. Nemuras*, 567 F.Supp. 87, 89-90 (D. Md. 1983), aff'd, 740 F.2d 286 (4th Cir. 1984), where the judge frankly admitted "no expanded written definition of what constitutes a 'lewd exhibition of genital areas' would encompass all of the uncountable variations which such photographs might take" and "words cannot describe all of the nuances of that which constitutes lewdness." This "I know it when I see it" criterion does not provide explicit standards for those who apply the law, explicit standards to avoid resolution of basic policy matters on an ad hoc and subjective basis, a requirement of many cases from this Court. *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983); *Smith v. Goguen*, 415 U.S. 566, 572-575 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

The Court of Appeals decision contributed no significant certainty by defining a "lascivious exhibition" to mean a picture of nudity "so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur" and by concluding each of the pictures were "a lascivious exhibition because the photographer arrayed it to suit his peculiar lust." (A-10.) Expecting law enforcement personnel, judges and juries (as well as persons desiring to obey the law) to ascertain and evaluate what would "satisfy the sexual cravings of a voyeur" asks too much.

"Broad prophylactic rules in the area of free expression are suspect. . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *N. A. A. C. P. v. Button*, 371 U.S. 415, 438 (1963).

Consideration should be given to whether Judge Miller was correct when he observed in *United States v. Nemuras*, 567 F.Supp. at 89-90 that no written definition of "lewdness" (or "lasciviousness") could encompass all its "uncountable variations" and that "words cannot describe all of the nuances of that which constitutes lewdness." If Judge Miller was right, serious questions are raised about the constitutionality of the federal law Mr. Wiegand was convicted of violating. Certiorari should be granted.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

August, 1987

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 86-5213

United States of America,
Plaintiff/Appellee,

v.

Edwin E. Wiegand,
Defendant/Appellant.

Opinion, filed March 18, 1987

Before: Joseph T. Sneed, Jerome Farris and John T. Noonan, Jr., Circuit Judges.

NOONAN, Circuit Judge:

Edwin Emil Wiegand of Oceanside, California appeals his conviction under 18 U.S.C. secs. 2251 and 2252 of the sexual exploitation of children and his conviction under 18 U.S.C. sec. 371 of conspiracy to exploit children. His offense was to pose two girls, one aged 17, one aged 10, for photographs focused on their genitalia. He challenges both the warrant which led to the material that resulted in his conviction and the meaning of "lascivious" as used in the statute and interpreted by the district court.

On December 7, 1985 George A. Runkle, Jr., a special agent of the Federal Bureau of Investigation assigned to the San Diego division, filed an affidavit before Magistrate Irma E. Gonzalez setting out the following:

A reliable confidential informant had told him that in

April 1983 he had visited Wiegand's residence and viewed films of children as young as 9 or 10 years of age engaged in sexual intercourse with adults; the informant told him that one Steven Michael Lang, an associate of Wiegand, had said to him on October 15, 1985 that he, Lang, had recently seen "Mr. Ed's kiddie porn films;" Lang, who had accompanied the informant on his visit to Wiegand in 1983, had also told the informant of photographing naked young females in Europe and sending their pictures to Wiegand from Europe in the summer of 1984; Richard Ruddiman, a cab company employee and friend of Wiegand, had told Runkle that Lang had informed Ruddiman about seeing a "beauty pageant" of naked children at Wiegand's place on October 12, 1985, and on October 13, Wiegand had expressed concern to Ruddiman that a former associate of Wiegand's has been recently arrested on child pornography charges and might inform the police about his association with Wiegand; Ruddiman told Runkle that on December 2, 1985 he had watched a pornographic video at Wiegand's showing the activities of a girl of 10 to 12 years old; on October 26, 1985 Ruddiman, who was cooperating with the FBI, wore a body recorder during conversation with Wiegand at Black's Beach, La Jolla, and, in the conversation recorded, Wiegand described one of his films as showing "a very cute 12 or 13 year old girl" undergoing sexual intercourse; in the same recorded conversation Wiegand went on to say that some of the children in his films were only 9 or 10 years old and one was a girl of 5 years of age.

On the basis of this information, Special Agent Runkle deposed that he had reason to believe that at Wiegand's mobile home in a mobile home park in Oceanside there were "films, photographs, video tapes, negatives or slides, depicting a person under the age of

18 years of age engaged in an act of sexual conduct," which he then specified in greater detail. On the basis of this affidavit, Magistrate Gonzalez issued the warrant for the property described by Runkle as being in violation of 18 U.S.C. secs. 1462, 2251, and 2252.

Wiegand maintains that there was no probable cause for the warrant to issue. He puts heavy emphasis on the statement by Agent Runkle made to him at the time of the search that he "felt that there was no probable cause to believe that a federal crime had been committed." He goes on to argue that nothing in the affidavit indicated that Wiegand himself had produced any child pornography in violation of 18 U.S.C. sec. 2251, which requires that the photographer have reason to know his films will be mailed, or that he had received in the mail or in interstate or foreign commerce any child pornography in violation of 18 U.S.C. sec. 2252, or that he had violated 18 U.S.C. sec. 1462, which prohibits taking obscene material from a common carrier.

The standard by which the sufficiency of a warrant is measured for searching for photographs is the same standard as that used in justifying a warrant for other forms of contraband. *New York v. P. J. Video, Inc.*, 106 S.Ct. 1612, 1615 (1986). It is the standard set by *Illinois v. Gates*, 462 U.S. 213 (1983). The magistrate must make "a practical, commonsense decision whether, given all the circumstances set forth in the affidavit," there is a fair probability that evidence of a crime will be found in a particular place. 462 U.S. at 2338.

Magistrate Gonzalez made such a practical common sense decision. She had abundant reason to believe that Wiegand was in the possession of material in violation of

18 U.S.C. sec 2251 or 2252. She could not, of course, be certain that he had received it in interstate commerce or through the mail or that he intended to develop his film by mailing it, but there was certainly a fair probability that any film he had or had made had been developed outside his trailer and had been mailed back to him. The affidavit vividly conveyed an impression of a devotee of child pornography likely enough to seek a supply through the mails and likely enough to want professional development of any films he himself might make. Magistrate Gonzalez did not have to be certain of his guilt. She only had to think that there was enough in Agent Runkle's affidavit to justify her conclusion that there was a fair probability of finding evidence.

Wiegand presses his critique of the warrant, contending that it does not "meet the exacting standard required when the power of search and seizure is used as an instrument to suppress material presumptively protected by the First Amendment." His critique is bolstered by a decision of another circuit holding that a similar warrant violated the Fourth Amendment and that materials obtained pursuant to it must be suppressed. *United States v. Diamond*, 808 F.2d 922 (lst Cir 1987) (2-1 decision per Coffin, J., Cambell, C.J., dissenting). In *Diamond* the court reasoned that the officers making the search would not have a basis for distinguishing film depicting "young-looking adults" from film depicting children. As sexually explicit nonobscene films of adults fall within the protection of the First Amendment, and as the search took place within the sacred precincts of the home, the court held that the Fourth Amendment "would not tolerate" the warrant, which could have resulted "in the mistaken seizure of constitutionally protected materials of no evidentiary value in a criminal prosecution from a

private home." Id.

Precedent in this circuit is to the contrary. *United States v. Hurt*, 795 F.2d 765, 772 (9th Cir. 1986); cf. *United States v. Smith*, 795 F.2d 841, 848 (9th Cir. 1986). *United States v. Hale*, 784 F.2d 1465 (9th Cir. 1986) is not an exception: the seizure there held constitutionally impermissible was not pursuant to a warrant drawing the line at age and authorizing the seizure of material showing minors in explicit sexual acts. Acknowledging the force of the First Circuit's reasoning, we are bound by more than precedent: we believe that *Hurt* has struck the right balance.

The Fourth Amendment asserts the right of the people to be secure from "unreasonable searches and seizures" and requires that no warrant issue but upon probable cause "and particularly describing the place to be searched, and the persons or things to be seized." What is an unreasonable search turns on a consideration of all the circumstances. What is particularity depends on the nature of the thing to be seized.

Making clear that probable cause for seizing films is not different from probable cause in other searches, the Supreme Court has reaffirmed that the seizure of materials "presumptively protected by the First Amendment" must be supported by affidavits "setting forth specific facts." *New York v. P. J. Video*, 106 S.Ct. 1610, 1614. As the Court than quoted *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961), the purpose of this requirement is that the issuing magistrate may "focus searchingly on the question of obscenity." Child pornography is not presumptively protected by the First Amendment; it is almost completely outside its protection.

New York v. Ferber, 458 U.S. 747, 763 (1982). When film is described in the graphic terms of the statute on the sexual exploitation of children the film is described with all the particularity necessary to satisfy the Fourth Amendment. So in this case Magistrate Gonzalez was able on the basis of Agent Runkle's affidavit to "focus searchingly" on the question of whether the materials he described fell within the statutory description. Little was left to the imagination, and nothing to the discretion, of the searchers as to what they were to look for and carry off. The were restricted to film depicting explicit acts of sexual conduct -- explicitly described in the warrant -- by children under the age of 18.

Judge Coffin in *Diamond* reasoned that the searchers might seize constitutionally-protected adult pornography. Common sense suggests that most of the time one can tell the difference between a child and an adult. Of course, there are persons under 18 who look over 18 and vice versa, but the ability to distinguish is the basis on which criminal liability accrues under the statute: no one has contended that Wiegand should be acquitted because one of his subjects might pass for over 18. The predicate of many statutory rape laws is that the actor must at his peril be able to tell the difference in age of the victim. If such laws are not unconstitutional because a mistake as to age might be made, it is difficult to hold a warrant unconstitutional because error could occur under its direction. That apparently in child pornography films some adults play the part of children does not materially alter the case: to seize the pornographic picture of an adult who is acting the part of a child is not an unreasonable seizure.

The statute makes criminal only the production of

child-exploitative films, or their receipt, in relation to the mails or commerce subject to federal law. The statute does not criminalize mere possession. Was the warrant overly broad in failing to distinguish between material violative of the statute and material legally obtained in some other way unconstitutionally broad? *Ferber* established that child pornography was "a category of material outside the protection of the First Amendment." Id. at 763. No intrusion on a First Amendment right would occur if legally-possessed child pornography were seized along with criminal contraband. The remedy for the wrong would be return of the legal material not suppression of the evidence.

It was conceded in *Ferber* that there might be "a tiny fraction" of pictures portraying the sexual acts of children that might fall within the First Amendment's range. *Ferber* at 773. Not for that reason was a statute unconstitutional which criminalized the presentation of such pictures. Analogously, a warrant to search for film portraying the sexual exploitation of children is not defective because the possibility exists that a tiny fraction of the material seized might be found to fall within the exception acknowledged by *Ferber*. In the protection of children otherwise privileged expressions may be affected. *FCC v. Pacifica Foundation*, 438 U.S. 726, 749 (1978).

Wiegand has a final objection to the warrant: it departed from the statutory language in describing the film sought as inter alia depicting children in "exhibition of the genitals for the purpose of sexual stimulation of the viewer." The statutory language is "lascivious exhibition of the genitals." The warrant was slightly more specific than the statute. No injury was done Wiegand by

its greater specificity.

Wiegand, however, contends that the statutory term "lascivious" is itself unconstitutionally vague as used in the indictment and as interpreted by the district judge. "Lascivious" is no different in its meaning than "lewd," a commonsensical term whose constitutionality was specifically upheld in *Miller v. California*, 413 U.S. 15, 25 (1973), and in *Ferber* at 765.

The district court in its oral decision declared that it understood "lascivious" and "lewd" to be "virtually interchangeable." Applying this definition to the pictures before it, the court analyzed those of a naked 17-year-old girl taken in a series of poses displaying her pubic area. The court found that some of the pictures depicted "a willingness to engage in sexual activity" and that some showed the girl "in a position that suggests sexual activity." The court then considered a single picture of a naked 10-year-old girl. It found the picture depicting neither sexual willingness nor sexual activity, aptly adding that "it would be almost incredible" that a child of these years would register sexual coyness. But the picture it found to be lewd in its "unnatural" focus on the girl's genitalia.

In its written decision, 636 F.Supp. 828, 832 (S.D. Cal. 1986) the district court cited *United States v. Nemuras*, 567 F.Supp. 87 (D. Md. 1983), aff'd, 740 F.2d 286 (4th Cir. 1984), a case treating "lewd" and "lascivious" as interchangeable. The district court then enumerated six factors it considered in determining whether there had been depiction of lascivious exhibitions, beginning with "the focal point" of the depictions -- the genitalia of the girls. The court used the terms "unnatural" and "unusual"

to describe the 10 year old girl's pose in the picture.

Wiegand challenges the district court's interpretation of "lascivious." Her claims that the court employed an "essentially subjective test." He rings changes on the meaning of "lascivious." His challenge is equally applicable to the term "lewd." It is a challenge reciting the obvious, that these terms are not independent of a social, cultural, and moral context. The same observation of course is true of "reasonable" as it has been read into the Sherman Act. Normative terms incarnate norms. Norms do vary over time and place. The law's embodiment in the contemporary customs and conventions of a community is not a constitutional infirmity.

Wiegand asks this court to make its own independent determination of whether or not the pictures are lascivious. The question of whether the pictures fall within the statutory definition is a question of fact as to which we must uphold the district court's findings unless clearly erroneous. Cf. *United States v. Merrill*, 746 F.2d 458, 463 (9th Cir. 1984), cert. denied, 469 U.S. 1165 (1985). The definition of "lascivious" is a matter of law which we review de novo. Necessarily in deciding whether the district court erred as to the facts, we must view the pictures ourselves and must interpret the statutory term. Doing so, we conclude that there was no error either as to fact or law.

The standard employed by the district court was over-generous to the defendant in implying as to the 17-year-old girl that the pictures would not be lascivious unless they showed sexual activity or willingness to engage in it. The offense defined in the statute is depiction of a "lascivious exhibition of the genitals."

Plainly the pictures were an exhibition. The exhibition was of the genitals. It was a lascivious exhibition because the photographer arrayed it to suit his peculiar lust. Each of the pictures featured the child photographed as a sexual object.

The district court noted the unlikelihood of the 10-year-old girl intending any sexual invitation by her pose. "Lascivious" does not have such a connotation when applied to the conduct of adults. In the context of the statute applied to the conduct of children, lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or likeminded pedophiles. The district court noted that the pose of the 10-year-old was "unnatural." This adjective does not reflect an incorrect reading of the statute although the terms goes beyond what is necessary to find the picture within the statutory definition. The picture of a child "engaged in sexually explicit conduct" within the meaning of 18 U.S.C. secs. 2251 and 2252 as defined by sec. 2255(2)(E) is a picture of a child's sex organs displayed lasciviously, that is, so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur.

The crime punished by the statutes against the sexual exploitation of children, however, does not consist in the cravings of the person posing the child or in the cravings of his audience. Private fantasies are not within the statute's ambit. The crime is the offense against the child -- the harm "to the physiological, emotional and mental health" of the child, *Ferber* at 758; the "psychological harm," id. at 775 (O'Conner, J., concurring); the invasion of the child's "vulnerability." Id. at 776 (Brennan, J., concurring). These harms collectively are

the consequential damages that flow from the trespass against the dignity of the child.

Any photograph makes its human subject an object. No offense to human dignity is done. The pornographic photographer subordinates the humanity of his subject to the sexuality of the subject. The humanity of the subject is not eliminated; how could it be? Indeed the interest of the pornographer is in the human person treated as sexual object. From a feminist perspective, this reduction of humanness has been seen as a male offense. See e.g., Ann Garry, "Pornography and Respect for Women" in D. Copp and S. Wendell, *Pornography and Censorship* (1983) 73. But whether the person is male or female, the essential operation is the same: an assault upon the humanity of the person pictured, making that person a mere means serving the voyeur's purposes. It is because of this reduction that a writer celebrated for his victory over censorship can write:

> But even I would censor genuine pornography, rigorously. It would not be very difficult. In the first place, genuine pornography is almost always underworld, it doesn't come into the open. In the second, you can recognize it by the insult it offers, invariably, to sex, and to the human spirit.

D. H. Lawrence, *Phoenix* (1936) 175.

Human dignity is offended by the pornographer. American law does not protect all human dignity; legally, an adult can consent to its diminishment. When a child is made the target of the pornographer-photographer, the statute will not suffer the insult to the human spirit, that

the child should be treated as a thing.

Affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
Crim. No. 86-0036-GT

United States of America,
Plaintiff

v.

Robert S. Dost & Edwin E. Wiegand,
Defendants

Verdict, June 12, 1986

Defendants each have been indicted for alleged violations of 18 U.S.C. sec. 2251(a) (using a minor to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct); 18 U.S.C. sec. 2252(a)(2) (knowing receipt or distribution of visual depictions of minor engaging in sexually explicit conduct); and 18 U.S.C. sec. 371 (conspiracy).

From the stipulated facts in this case, the Court makes the following findings. Both defendants induced, enticed, or used minor children for the purpose of producing visual depictions of those minors. Defendants took a series of pictures of two minors in June, 1984. Of the 22 photographs admitted into evidence, 21 of them (Government's Exhibits 2a-10a, 12a-23a) are of one subject, a girl whom the defendants knew to be 14-years-old at the time the pictures were taken. These photographs were taken by both defendants at defendant Dost's residence where he had the nude girl assume various supine and sitting poses. The one other

photograph (Government Exhibit 11a) is of a 10-year-old girl. The girl is nude and sitting on the beach. Defendant Dost had the girl pose for this picture, and defendant Wiegand took the photograph. The undeveloped film was then mailed to a photo processing company in Hollywood, California, and, after processing, was mailed back to the defendants. The stipulated facts establish that both defendants conspired, used minors as subjects of visual depictions knowing that the visual depictions would be mailed, and knowingly received visual depictions through the mail.

The critical issue in this case is whether the pictures depict the minors engaging in sexually explicit conduct as defined in 18 U.S.C. sec. 2255:

> For the purposes of this chapter, the term--
> . . .
> (2) "sexually explicit conduct" means actual or simulated--
> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
> (B) bestiality;
> (C) masturbation;
> (D) sadistic or masochistic; abuse; or
> (E) lascivious exhibition of the genitals or pubic area of any person.

The photographs at issue here do not meet the definitions contained in subsections (A), (B), (C), or (D). These photographs depict "sexually explicit conduct" only if they contain a "lascivious exhibition of the genitals or pubic area" under subsection (E).

In 1984, Congress amended the existing law by enacting the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 206. This amendment created substantive changes in the law which are not relevant here.[1] However, the amendment made two changes in the definition of "sexually explicit conduct," one of which is

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[1] The 1984 amendment eliminated the requirement that the transportation of the visual depiction be "for the purpose of sale or distribution for sale." Congress recognized that many of the persons distributing or transporting the prohibited material were doing so for their own personal pleasure, rather than for pecuniary profit.

The amendment removed printed material from the terms of the law. Only visual depictions of minors engaging in sexual explicit conduct are prohibited. See *New York v. Ferber*, 458 U.S. 747, 764-765 (1982) (descriptions or depictions of sexual conduct which do not involve photographic or other visual reproduction retain first amendment protection).

The obscenity requirement was eliminated from sec. 2252. Other changes imposed forfeitures of property for violations of the child pornography laws, 18 U.S.C. sec. 2253 (civil forfeiture) and 18 U.S.C. sec. 2254 (criminal forfeiture), and authorized wiretaps to assist in the enforcement of the laws. 18 U.S.C. sec. 2516(1)(C).

Last, the amendment raised the ceiling on the fines which can be imposed for violation. See 18 U.S.C. secs. 2251, 2252 (first time offender can be fined $100,000, up from $10,000; repeat offender can be fined $200,000, up from $15,000; and any organization can be fined $250,000).

Congress also made changes in the definitions of the terms used in secs. 2251 and 2252. "Minor" was redefined to include persons under the age of eighteen. Previously the definition of minor included only those under the age of sixteen. 18 U.S.C. sec. 2255(1).

relevant here.[2] Congress substituted the term "lascivious" in place of "lewd" in subsection (E) of sec. 2255(2). The reason for this change was described as follows:

> [T]his amendment would replace the current law's prohibition of the "lewd exhibition of the genitals" with a prohibition against the "lascivious exhibition of the genitals." "Lewd" has in the past been equated with "obscene"; this change is thus intended to make it clear that an exhibition of a child's genitals does not have to meet the obscenity standard to be unlawful."

130 Cong. Rec. S3510, S3511 (daily ed. Mar. 30, 1984) (statement of Rep. Specter).

The 1984 amendments conformed federal law to the Supreme Court's holding in *New York v. Ferber*, 458 U.S. 747 (1982). In interpreting a New York law, the Supreme Court affirmed that child pornography is outside the protection of the first amendment, regardless of whether it is obscene under the standard enunciated in *Miller v. California*, 413 U.S. 15 (1973). *Ferber*, 458 U.S. at 763. The purpose behind enactment of the various protective laws known commonly as the "kiddie porn" laws is to protect children from the harmful effects of this type of sexual exploitation:

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[2] Congress amended the definition of "sexual explicit conduct" as it relates to sado-masochism. the previous law had prohibited depictions of "sad-masochistic abuse (for the purpose of sexual stimulation)." The amended law prohibits visual depictions of sadistic or masochistic abuse. The requirement that the depiction be for purposes of sexual stimulation was eliminated. 18 U.S.C. sec. 2255(2)(D).

> A 12-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph "edifying" or "tasteless." The audience's appreciation of the depiction is simply irrelevant to [the state's] asserted interest in protecting children from psychological, emotional, and mental harm.

Ferber, 458 U.S. at 774-775 (O'Connor, J., concurring).

Congress' intent, as evidenced by the change in the subsection (E) terminology and other changes, was to broaden the scope of the existing "kiddie porn" laws.[3] Congress believed that the term "lewd" used in subsection (E) was too restrictive since it had been closely associated with the more stringent standard of obscenity.[4]

Only one case has interpreted the language of subsection (E) and this interpretation occurred before Congress changed the definition in 1984. In *United States v. Nemuras*, 567 F.Supp. 87 (D. Md. 1983), aff'd, 740 F.2d

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[3] For a review of the legislative history of The Child Protection Act of 1984, see H.R. Rep. No. 536, 89th Cong., 1st Sess. 3 (1983), reprinted in 1984 U.S. Code Cong. & Ad. News 492.

[4] 130 Cong. Rec. S3510, 3511 (daily ed. Mar. 30, 1984) (statement of Rep. Specter). In spite of Congress' perceived significance in the change in terms, "lewd" and "lascivious" have frequently been used interchangeably. "Lascivious" has been defined to mean "wanton, *lewd*, lustful, licentious, lecherous, libidinous, and salacious" and "lewd" has been defined to mean "licentious, lecherous, dissolute, sensual, debauched, impure, obscene, salacious, and pornographic." *Schwartzmiller v. Gardner*, 567 F.Supp. 1371, 1374 (D. Idaho 1983), citing *State v. Evans*, 73 Idaho 50, 56, 245 P.2d 788, 791 (1952) (emphasis added).

286 (4th Cir. 1984), the court had to determine whether certain photographs constituted a "lewd exhibition of the genitals." Judge Miller stated that "lewd" had a "generally well recognized meaning, connotating sexual suggestiveness." *Nemuras*, 567 F.Supp. at 89. Although recognizing that words alone could not describe all the nuances of that which constitutes lewdness, id. at 90, Judge Miller concluded that

> examples of sexually suggestive or lewd photographs of children would be those in which the child is depicted as half or partially clothed, posed in such a way as to depict or suggest a willingness to engage in sexual activity or a sexually coy attitude.

Id. at 89.

Although this court agrees with Judge Miller's observations, his description of "lewdness" in the context of visual depictions of children does not go far enough. Although this Court would not presume to create a comprehensive definition of either lewdness or lasciviousness, a definition with which legal scholars have struggled for years,[5] the Court feels that the "lascivious exhibition" determination must be made on a case-by-case basis using general principles as guides for analysis.

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[5] In the obscenity context, the Supreme Court has recognized that its members have experienced "considerable vacillation over the proper definition of obscenity." *New York v. Ferber*, 458 U.S. 747, 754 (1982) E.g., Schauer, The Return of Variable Obscenity: The Developing Constitutional Standards, 28 Hastings L.J. 1275 (1977); Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5 (1960).

Because of the sexual innocence of children, that which constitutes a "lascivious exhibition" of a child's genitals will be different from that of a "lascivious or lewd exhibition" of an adult's genitals.[6] For example, Judge Miller in *Nemuras* referred to the sexual coyness of the visual depiction. A child of very tender years, because of his innocence in matters sexual, would presumably be incapable of exuding sexual coyness. Sexual coyness is an expression outside the young child's range of expression.

Instead this Court feels that, in determining whether a visual depiction of a minor constitutes a "lascivious exhibition of the genitals or pubic area" under sec. 2255(2)(E), the trier of fact should look to the following factors, among any others that may be relevant in the particular case:

1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;

2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

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[6] Cf. *Ginsberg v. New York*, 390 U.S. 929, 636 (1968) (concept of obscenity may vary according to the group to whom the questionable material is directed or from whom it is quarantined) (quoting *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 75, appeal dismissed sub nom., *Bookcase, Inc. v. Leary*, 385 U.S. 12 (1966).

4) whether the child is fully or partially clothed, or nude;

5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Of course, a visual depiction need not involve all of these factors to be a "lascivious exhibition of the genitals or pubic area." The determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor.

For example, consider a photograph depicting a young girl reclining or sitting on a bed, with a portion of her genitals exposed. Whether this visual depiction contains a "lascivious exhibition of the genitals" will depend on other aspects of the photograph. If, for example, she is dressed in a sexually seductive manner, with her open legs in the foreground, the photograph would most likely constitute a lascivious exhibition of the genitals. The combined effect of the setting, attire, pose, and emphasis on the genitals is designed to elicit a sexual response in the viewer, albeit perhaps not the "average viewer," but perhaps in the pedophile viewer. On the other hand, if the girl is wearing clothing appropriate for her age and is sitting in an ordinary way for her age, the visual depiction may not constitute a "lascivious exhibition" of the genitals, despite the fact that the genitals are visible.

In determining whether the photographs at issue here contain lascivious exhibitions of the genitals, the Court

acknowledges that Congress intended that the standard be lower than that for obscenity, in line with the Ferber holding.

The photographs of the 14-year-old girl (Government's Exhibits 2a-10a, 12a-23a) depict her totally nude posed in a variety of positions. Most pictures are of her reclining on some draped material, resembling a bed, with her genitals and breasts fully exposed. In most of the pictures, her legs are open and her arms are raised behind her head. In the majority of the pictures, her pubic area is in the foreground so as to be the prominent focal point of the photograph.

The single photograph of the 10-year-old child (Government's Exhibit 11a) portrays the child sitting on the beach, looking off to her right. She is leaning back, supporting her weight on her arms, hands resting on the sand. She is totally nude, and has some body painting on her chest. Her pelvic area appears to be slightly raised or hyperextended, and her legs are spread apart. Her right leg is fully extended at a slight outward angle. Her left leg is bent at the knee and extended almost perpendicularly away from the body. Her pubic area is completely exposed, not obscured by any shadow or body part.

Applying the factors articulated earlier, the Court finds that each and every one of these photographs depicts a "lascivious exhibition of the genitals or pubic area" under 18 U.S.C. sec. 2255(2)(E). The pictures of the 14-year-old definitely suggest a willingness to engage in sexual activity. In some of the photographs the subject has a sexually coy attitude, staring directly at the camera with her head slightly bent to the side. The focal point

of the photographs are the girl's well-developed genitalia; indeed, some of the poses border on the acrobatic in order to obtain an unusual perspective on her genitalia. Some of the pictures depict her fully extended in a supine position. Other pictures are of the subject in a sitting position with her legs wide apart. All of these poses would have to be characterized as sexual poses, not the way a child or adult ordinarily sits or reclines.

The visual depiction of the 10-year-old nude girl on the beach is, admittedly, not as graphic as those of the 14-year-old girl. The focal point of the photograph is the girl's genital area due to the unusual positioning of her legs. The girl's expression is not sexually coy, since she is squinting and looking away from the camera. As for the suggestion of a willingness to engage in sexual activity, her open legs do imply such a willingness but nothing else about the child's attitude does.

What strikes the Court most strongly, however, is the unusual pose of this girl. The average 10-year-old child sitting on the beach, especially when unclothed, does not sit with her legs positioned in such a manner. This unusual pose is one that an ordinary child would not normally assume but for adult coaching (as was the case here). This unnatural pose combined with the picture's emphasis on the girl's genitalia leads the Court to conclude that it too constitutes a "lascivious exhibition of the genitals."

The Court finds that all of the photographs (Government's Exhibits 2a-23a) of both the 14-year-old girl and the 10-year-old girl depict sexually explicit conduct in that they contain a "lascivious exhibition of the genitals or pubic areas" of the girls.

Accordingly, the court finds the defendants Dost and Wiegand GUILTY on all counts of the indictment.

Dated: June 11, 1986

/s/ Gordon Thompson, Jr.
Chief Judge
United States District Court

ORAL VERDICT OF DISTRICT COURT
(R.T. 72-77)

THE COURT: Well, let me go through the procedure that I went through with you to reach the conclusion that I reached.

We viewed the statute, both in the statutory -- Title 18, United States Code, sections 2251 and 2255, and in the manner in which this particular indictment was pled, specifically setting forth that the exceptionally explicit conduct of which these gentlemen were charged with violating was the lascivious exhibition of the genital and pubic areas. And that runs through the whole complaint -- the indictment.

In order to reach a decision, one has to determine what is a lascivious exhibition of the genital or pubic areas.

In the research that we found, a Judge James R. Miller in Baltimore decided a case in 1983 -- May 18th, 1983, called Michael Nemurres, N-e-m-u-r-r-e-s, and it

was in the Fed. Supp., 567 Fed.Supp. page 87. In that he wrote an opinion, and probably, if not the only opinion, certainly one of the very, few opinions --

MR. MICHAEL MCCABE: That's the only one I could find.

THE COURT: -- that have been written in this regard. And he says at various points throughout the opinion, and I'm going to read some of these points, he said, "The word lewd, in the court's judgment, however, has a generally well-recognized meaning connotating sexual suggestiveness. The word lewd was added to the statute to prevent the statute from being trivialized, that is applied to matters which might literally fall within the statute, but which were obviously not related to the sexual exploitation of children. The word lewd, in short, limits the sweep of subsection (E) of 2253(2) of Title 18 to the area of sexual exploitation of children."

Now this is the important part. He says, "In the court's view, examples of sexually suggestive or lewd photographs of children would be those in which the child is depicted as half or partially clothed, posed in such a way as to depict or suggest a willingness to engage in sexual activity or a sexual coy attitude."

I think that is about as good a definition of lewd and lascivious, and I'm taking them virtually as interchangeable, as I have found.

He goes on: "In this court's judgment, no expanded written definition of what constitutes a quote, lewd exhibition of the genital area, unquote, would encompass all of the uncountable variations which such photographs

might take, just as a written description of a face of a loved one could be read by a third person without that third person being able to see in his mind the same mental picture as in the mind of the person writing the description. In my judgment, the words cannot describe all of the nuances of that which constitutes lewdness. However, with a few general principles in mind, most persons, upon seeing a photograph which is lewd, would be able to agree that it is such."

Now I have looked at these photographs, and if we are to apply that standard, and I find that standard to be the appropriate standard, if we are to apply that standard, that is to depict or suggest a willingness to engage in sexual activity or a sexually coy attitude, there is no question in my mind but all of these photographs are lewd, without a doubt. Every photograph of the young lady, the older young lady, is clearly a photograph of a young lady that is either in a coy position or in a position that suggests sexual activity. There's no doubt about it.

First of all, most, if not all, of the positions are either prone or semi-prone, which is the standard position in which one finds themselves engaging in sexual activity as a rule, or in a sitting-up position, which is again one position which is a generally accepted method of sexual activity.

The expression on the face of the young lady, which was perhaps directed, perhaps not, I can't tell, is clearly that of a coy person attempting to elicit or suggest that she is extremely willing to have sex, and is almost in a way asking for it. For example, in some of the pictures she looks as though she is desirous of that; 15-A is one

of those pictures, 19-A is one of those pictures, 20-A is one of those pictures. All of them, as far as I'm concerned, fall within that category. They fit the definition clearly and without any question, and I'm satisfied that that is an appropriate definition, because these photographs are posed in such a way as to depict or suggest a willingness to engage in sexual activity or a sexually coy attitude.

As far as the 10-year-old's photograph is concerned, to me it is clearly a photograph posed in a way that depicts a sexual connotation, but I do not see it as depicting a willingness to engage in sexual activity or a sexually coy attitude. I question whether or not, under that definition, that this picture would fit. Maybe I'm being too narrow, maybe I'm drawing the definition too narrow, but if we look at the definition, this child of what, 10?

MS. FEIGIN: Yes, your honor.

THE COURT: Neither has a coy look, because -- well, she just doesn't. And there is nothing to indicate, other than the fact that her legs are separated, that she has any desire to enter into sexual activity. She has a desire to enter into sexual activity.

So if we look at the definition here, we have to say that this picture does not fit that definition. But is that definition really what it means? Does it say what is means? What you really want to know is, is this a lewd picture? Is it a lewd picture?

So we have to go further than Judge Miller went, because Judge Miller's decision fits these pictures, all of

the pictures other than 11-A, but Judge Miller's definition could never fit a child of three, five, seven. How could that fit? It would be almost incredible to let that definition stand alone to a child of tender, real tender age, and I consider this to be a tender age.

So it seems to me that we have to reach another definition, and while I'm not willing to go on uncharted waters and make definitions that I think are infallible, I will say this, that this picture of this 10-year-old is lewd, it's lewd for a 10-year-old, it would be lewd for an eight-year old, it would be lewd for a seven-year-old. Why? Because the picture is in an unnatural pose. This picture clearly would not have been lewd, as would these others, if they were lying down and not displaying or suggesting a visual depiction of the genital area. If they were standing up, clearly there would have been a question of whether or not you could say that they were lewd, and in my opinion they would not have been. But this picture, No. 11, is so unnatural for a child of that age, that I think that one would have to say that it is -- the fact that it is unnatural, makes it lewd. This is not a picture, for example, that your or I or the average person would take of their 10-year-old child, and I think that's what makes it lewd, because I think there is no other reason for this picture to be taken than to display the genital area of a 10-year-old which, in my opinion, is a lewd display.

So I find the defendants guilty on all the counts.

RULING OF DISTRICT COURT ON MOTION
(R.T. 62-65)

THE COURT: As far as the warrant is concerned, I

read the -- and the overbreadth issue of the warrant -- I read the Hale case, and the issue that was brought up by argument on behalf of both defendants is whether or not the -- I'm trying to get the exact wording -- whether or not the phrase "obscene, lewd, lascivious, or indecent" is less broad or more broad than "for the purpose of sexual stimulation of the viewer."

I tend to agree with the government in that I think that the Hale standard is much broader. Obscene, lewd, lascivious, or indecent all leave a great deal to the determination of the -- almost the legal determinations of the person or persons executing the warrant.

Now the argument is that "for the purpose of sexual stimulation of the viewer" leaves a substantial amount to the person executing the warrant, and that's probably true, but I also feel that it is more specific than the language in Hale, but more importantly I feel that there is little or no other way to plead it or to put it in a warrant. And so I'm going to hold that, while I understand Mr. McCabe's argument, that this is sufficient given the circumstances of this warrant, it is sufficiently specific. It meets the standard, the two, quote, higher procedural standards, unquote. Because while they recognize that child pornography is unprotected by the First Amendment, they also say that for the purpose of warrantless seizures, that it is irrelevant. I'm satisfied that the higher procedural standards are met in that we are not dealing here with a specific publication as they were in "Joe and His Uncle." We are dealing here with what are pictures as provided by the affidavit of the warrant, and given the affidavit for the warrant, I think it is sufficient. I think there is plenty of evidence of material received within the past five years, and I don't

think the statute of limitations is an issue, and so I'm going to deny that motion to suppress the evidence seized from defendant's safe deposit box and the return of the property as well.

* * *

. . . And the motion to suppress the house search is denied because there is no evidence that they did anything other than search for what they were looking for, and that's the pictures. Now the fact that they took -- and I think Mr. Runkle's testimony that taking the group of pictures to determine whether or not he was more -- had more than just a passing interest in children, is not unreasonable. I think it's one thing to take pictures of babies lying on rugs with their bottoms up and I think it's a total other thing to have a mass of nudes in whatever positions, whatever act, around the house. And I think the purpose for which those were seized was an appropriate purpose under the circumstances of this search warrant. So the search was not overbroad, nor was the warrant. . .As I said before that there is probable cause and that the warrant is stated with sufficient particularity.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 86-5213

United States of America,
Plaintiff/Appellee,

v.

Edwin E. Wiegand,
Defendant/Appellant.

Order, filed July 10, 1987

Before: Joseph T. Sneed, Jerome Farris and John T. Noonan, Jr., Circuit Judges.

The panel as constituted in the above-referenced case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing. An active judge called for an en banc vote and a majority of the judges of the court has voted to reject the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.